which all he [or she] can afford are those things which society regards as essential to his [or her] survival as a member of it.'

(Reasons, para.16)

The AAT decided that Darker's living expenses were so close to her income that she had no 'capacity to sustain deductions from her pension': Reasons, para 19.

The AAT said the proper course was to write off the outstanding balance of Darker's debt. That balance could be recovered from Darker if her means improved.

The AAT said that writing-off of a debt under s.186(1)(a) of the *Social Security Act* did not expunge the debt or affect the right of Commonwealth to recover that debt. Rather, writing-off a debt was an accounting practice which acknowledged the reality that, while a debt was legally recoverable, in practice it was not:

'In business "bad" debts are written off regularly, so that the statement of account can present a true picture of the assets of the business. There is no reason in principle why in similar circumstances such action should not be taken in respect of debts owed to the Commonwealth so as to enable its accounts to reflect accurately the reality of the situation.'

(Reasons, para.21)

Formal decision

The AAT set aside the decision under review and decided that the balance of the overpayment should be written off until such time as Darker had the means to repay all or part of the debt without reducing her standard of living below the lowest level generally acceptable in the Australian community.

CIOCANI and SECRETARY TO DSS (No. N87/621)

Decided: 10 February 1988 by J.H. McClintock.

The DSS decided that Raphael Ciocani had been overpaid $2316 on 7 occasions in rehabilitation allowance, sickness benefit and invalid pension; and that this should be recovered from Ciocani's current invalid pension at the rate of $8 a week.

Ciocani asked the AAT to review that decision.

Discretion to waive recovery

The AAT found that each of the overpayments had occurred. The first overpayment had been the result of Departmental error; and the other overpayments had resulted from confusion on the part of Ciocani, compounded by the complex structure which the DSS had adopted for administering various income support programs.

The AAT noted that Ciocani had migrated to Australia from Romania in 1980, when he was 20. He had poor English, and suffered from a serious speech defect, a psychiatric illness and eneuresis. Ciocani's financial position was so poor that he could only afford shared accommodation. But his social, medical, psychiatric and cultural problems made it very difficult to find and keep that accommodation. He said that he had moved more than 50 times.

The AAT observed:

'34. This case highlights the difficulties which can be encountered by people coming from other cultures and who, because of difficulties with the English language, depend to a large extent on inaccurate information about how the [social] security system operates, often obtained from equally ill-informed associates. It is also illustrative of the difficulties faced by those living from hand to mouth on pensions or benefits with delays and waiting periods. These difficulties are always increased for those having to find accommodation in the private sector.'

On the other hand, Ciocani had received public moneys to which he was not entitled. Given the circumstances in which the first overpayment arose and 'compassionate considerations', recovery of that overpayment should be waived under s.186(1)(b) of the *Social Security Act*, formerly s.146(1)(b). The balance should be paid by withholding $5 a week from his invalid pension.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that the first overpayment (of $359) be waived; and the balance be recovered at the rate of no more than $5 a week.

Handicapped child's allowance

BONNICK and SECRETARY TO DSS (No. W87/150)

Decided: 8 February 1988 by R.D. Nicholson, J.G. Billings and N. Marinovich.

The AAT *affirmed* a DSS decision to reject a claim for handicapped child's allowance made by the mother of a 6-year-old child, who suffered from a hearing defect, for which he had undergone operations in March and July 1987, and eneuresis (bed wetting).

The AAT said that the child needed regular attention to his ears: this was care and attention, marginally less than constant, as required by ss.105JA and 105H(1) of the *Social Security Act*. However, that care and attention was not needed 'permanently or for an extended period', as the second operation had largely resolved the problems. Therefore, the child was not a 'handicapped child' as defined in s.105H(1).

Moreover, there was no evidence that Bonnick had suffered from 'severe financial hardship as a result of the provision of care to her child; so that she did not meet all the requirements of s.105JA.

The AAT said that, once the child had the second operation, the level of care and attention needed fell short of 'only marginally less' than constant. So there was no question of Bonnick qualifying for the allowance after that operation.

The AAT concluded by saying that Bonnick could not qualify for child disability allowance, which replaced handicapped child's allowance from 15 November 1987. Her child did not need 'care and attention . . . on a daily basis that is substantially more than the care and attention needed by a child of the same age who does not have such a disability'; and was, therefore, not a 'disabled child' as defined in s.101.

WILLIAMSON and SECRETARY TO DSS (No.V87/180)

Decided: 2 March 1988 by H.E. Hallowes.

Susan Williamson had been granted a handicapped child's allowance for her child, A, in May 1983. The DSS decided that the allowance should be cancelled from May 1986 and Williamson asked the AAT to review that decision.

The legislation

The DSS had decided that Williamson was no longer eligible for the allowance because of A's absence from home.

At the time of the cancellation of the allowance, s.105JA of the *Social Security Act* provided that the Secretary might grant a handicapped child's allowance to a person who was providing care and attention to a handicapped child in a private home that was their residence.

Section 105KA(1) provided that entitlement to the allowance was not affected by the child being 'temporarily absent' from home for 'a period of not more than 28 days' during any year.

Section 105KA(2) gave the DSS a discretion to preserve a person's entitlement to the allowance, where a child was absent from home for more than 28 days in a year and '(b) the Secretary is satisfied that the absence is or was temporary.'

The evidence

A, who was born in 1973, had attended

school in Ballarat, where he lived with his mother, until the beginning of 1986, when he enrolled at a special school in Melbourne. During the school term, A boarded 4 nights in each week with another family in Melbourne. On the remaining 3 nights and during school holidays, A lived at home with Williamson.

Williamson told the AAT that she made all decisions about A's activities and care; and that the family with whom he boarded were 'baby-sitting' him during the week. She said that she considered A's home to be in Ballarat with her; and his stay in Melbourne to be temporary, so as to enable him to attend the special school until he turned 16 years (in 1989).

Entitlement preserved

The AAT said, first, that the reference in s.105KA(1) to absence 'for a period of not more than 28 days' in a year was a reference to a continuous period: it did not permit the DSS to add separate, shorter, periods together.

It followed that a parent's eligibility for the allowance was preserved by s.105KA(1) where her child spent 4 days in each school week absent from home: none of the periods of absence was more than 28 days (although those periods would aggregate considerably more than 28 days in any year).

Secondly, the AAT said that, if its reading of s.105KA(1) was wrong, this was an appropriate case for the exercise of the discretion in s.105KA(2). The child's absences from home were 'limited to the fulfilment of a passing purpose' and were therefore 'temporary', as the Federal Court had interpreted that term in *Hafza v Director-General of Social Security* (1985)26 *SSR* 321.

After noting that Williamson drove A to school each Monday and collected him each Friday, and played an active role in controlling A's activities during his absences from home, the AAT said:

> 'Welfare legislation should not be interpreted narrowly so as to exclude from its operation those applicants who at great personal cost to themselves provide for a handicapped child so that the child may reach her or his potential.'

Formal decision

The AAT set aside the decision under review and directed the Secretary that Williamson be paid handicapped child's allowance from the date of the cancellation.

Assets test

CALDWELL and SECRETARY TO DSS (No. N87/643)
Decided: 27 November 1987 by A.P. Renouf.

The AAT *affirmed* a DSS decision to value the applicant's shares, for the purpose of the assets test, at the market price.

Caldwell argued that, while this was an appropriate valuation method for share traders, it was not a fair valuation for long-term investors. He proposed an alternative valuation formula to discount non-constant factors.

The AAT noted that the *Social Security Act* did not prescribe a valuation method, but that the DSS had used the market value as a convenient, simple and consistent method.

The AAT said that Caldwell's proposal was 'worthy of consideration by government'; but implied that the Tribunal could not adopt it:

> '5. It would appear that it is for the Minister and through him the Department of Social Security rather than this Tribunal to examine the suggestion for what the applicant is really seeking, as he admits, is a change of government policy or practice.
>
> 6. The decision under review is merely one application of that policy or practice and I can find nothing wrong with the application in the [present] instance.'

[**Editor's note:** The AAT was apparently unaware of the Federal Court's decision in *Drake v Minister for Immigration* (1979) 2 ALD 60, to the effect that the Tribunal should not uncritically adopt government or departmental policy; and that, if it simply adopts any such policy without making an independent assessment of its propriety, the Tribunal commits an error of law.]

SOTTOSANTI and SECRETARY TO DSS (No. V87/163)
Decided: 24 February 1988 by R.A. Balmford.

Antonio Sottosanti had been granted an age pension in 1977. When the assets test was introduced in March 1985, the DSS decided to cancel his pension. He asked the AAT to review that decision.

The evidence

Sottosanti had come to Australia in 1948, when he was 38 years of age, to join his father, who had been here for 21 years. Sottosanti and his wife and 3 children lived on his father's farm. Over the next few years Sottosanti bought 5 blocks of residential land and built a small house for his family. The titles to this land were later consolidated, into a parcel slightly less than a hectare, and known as the 'brown land'.

After his father's death, Sottosanti acquired title to the farm, of 10 hectares, known as the 'pink land'. He also acquired three pieces of land adjacent to the 'pink land', known as the 'green land' (50 hectares), the 'red land' (11 hectares), and the 'red-hatched land' (3 hectares).

One of Sottosanti's son, G, had farmed all of this land, along with his own block of 42 hectares, since 1977. The land had recently been found to be affected by dieldrin, which was likely serously to affect its use as a farm.

Sottosanti's land was valued at $550 000; and the commercial rent from the land, apart from the brown land, had been estimated at $6080 a year.

Evidence was given to the AAT of Sottosanti's attachment to the land, and the expectation that he would leave it to his 5 children.

G had originally paid no rent for the use of Sottosanti's land but had later agreed to pay $1500 a year. When Sottosanti's pension was cancelled, G increased this payment to $4500; but he was forced to increase his overdraft to do this; and he would now need to sell some of his land to reduce that overdraft. G had taken out a mortgage of $50 000 on his own land to finance the building of a house for Sottosanti and was paying $16 560 under the mortgage.

The taxable income of G and his wife was $25 192 in 1985-86 and $7888 in 1986-87. At the end of 1987, G owed a total of $145 932 to the bank.

Reasonable to sell part of property?

The DSS accepted that the financial hardship provision, now s.7(1) but formerly s.6AD(1), applied to the red and green land which directly adjoined G's land, because Sottosanti could not reasonably be expected to sell, realise or use it as security for borrowing. But the DSS argued that this could not be said of the brown, pink or red-hatched land which did not adjoin G's land. G's farming operations, the DSS said, could be carried on without this land.

The AAT rejected the DSS argument. It referred to a news release in May 1985 from the Minister for Social Security, to the effect that a person would not be expected to sell farming property owned for 20 years or worked by a close relative for 10 years. Those periods were satisfied in this case.

The AAT also said that selling part of the land -

> 'would turn a marginal farm into a more marginal farm. If this farm is worth retaining in the Sottosanti family - which the respondent, by his concession in respect of the red and green land accepts it is - then it should be retained as a whole. If the applicant cannot reasonably be expected to sell part of the farm then he cannot reasonably be expected to sell the whole.'

(Reasons, para.28)